NATIONAL WILDLIFE FEDERATION

IBLA 84-505 Decided September 5, 1984

Appeal from denial of a protest to a determination by the Montana State Office, Bureau of Land Management, to proceed with a private land exchange. M 58537.

Vacated and remanded.

1. Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- Rules of Practice: Appeals: Standing to Appeal

   Where a national conservation organization challenges a Bureau of Land Management determination to proceed with a private exchange, that organization satisfies the requirements of 43 CFR 4.410 by establishing that it is a "party to a case" and that it is adversely affected because its membership uses the public land in question.

2. Environmental Quality: Environmental Statements -- Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- National Environmental Policy Act of 1969: Environmental Statements

   Denial of a protest of a determination to proceed with a private exchange will be vacated and the case remanded where the record fails to reflect an evaluation of the environmental impacts sufficient to support an informed judgment.

3. Environmental Quality: Environmental Statements -- Exchanges of Land: Generally -- Federal Land Policy and Management Act of 1976: Exchanges -- National Environmental Policy Act of 1969: Environmental Statements

   Where the record shows that missing information is material to an agency decision on a private land exchange, it must be gathered and included in an environmental assessment. Only where the costs of obtaining the information are exorbitant or the means of obtaining it are beyond the state of the art must the agency weigh the need for the action against the risk and severity of possible adverse impacts of proceeding

> in the face of uncertainty. And only in the case of a determination to proceed in the face of uncertainty must a worst case analysis be conducted in accordance with 40 CFR 1502.22.

APPEARANCES: Janalyn S. Edmondson, Donald M. Blurton, and Thomas M. France, Esq., Missoula, Montana, for appellant; Richard K. Aldrich, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

National Wildlife Federation (NWF) has appealed from a decision by the Montana State Office, Bureau of Land Management (BLM), to proceed with private land exchange M 58537, involving an exchange of 1,430.59 acres of public land in Fergus County, Montana, for 241.1 acres of private lands in the same county.

On June 15, 1982, Tom DeMars filed a letter with BLM seeking to exchange some of his private land adjacent to the Missouri River for certain public lands. Following compilation of background documentation, on February 22, 1984, BLM issued a notice of realty action in accordance with 43 CFR 2200.1(c). 1/ The notice indicated that interested parties had 45 days from

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1/ The notice was subsequently published in the Federal Register at 49 FR 7663 (Mar. 1, 1984). The lands were described in the notice as follows:

"Principal Meridian, Montana
T. 21 N., R. 19 E.,
Sec. 35, SW 1/4
T. 20 N., R. 20 E.,
Sec. 4, W 1/2 SW 1/4;
Sec. 5, lot 12, and E 1/2 SE 1/4;
Sec. 6, lots 1 through 4, 7 through 14, and 17 through 19;
Sec. 8, N 1/2.
T. 21 N., R. 20 E.,
Sec. 31, lots 3 and 4, NE 1/4 SW 1/4,
NE 1/4 SE 1/4 SW 1/4, and W 1/2 SE 1/4 SW 1/4.
Aggregating 1,430.59 Acres of Public land.
"In exchange for these lands, the United States will acquire the following described lands:
"Principal Meridian, Montana
T. 23 N., R. 22 E.,
Sec. 17, lots 6 and 7, and NW 1/4 SW 1/4;
Sec. 18, lot 13 and SW 1/4 SE 1/4;
Sec. 19, lots 1 and 2.
Aggregating 241.1 acres of Private Land."

The selected lands were originally appraised at $183,033.75. This figure was subsequently adjusted as explained in a file memorandum dated Mar. 29, 1984. Therein, it is stated:

"Notice of Realty Action dated March 1, 1984 deletes 20 acres from the original appraisal -- T. 21 N., R. 20 E., Section 31: E 1/2 SE 1/4 SW 1/4

the date of the notice within which to submit comments to the Lewistown District Office, BLM. It also stated that adverse comments would be evaluated by the BLM, Montana State Director. The notice was accompanied by an Environmental Assessment (EA) and a land report.

On March 12, 1984, a Regional Executive for NWF filed comments in response to the notice. He noted that NWF totally supported acquisition of the 240-acre tract along the Missouri River. However, he expressed concern that the public lands proposed for exchange contained "relatively high wildlife values"; that the prospective owner of the public lands intended to "plow out" or "sodbust" the grassland and convert it to grain production; and that other public land tracts in the same area with minimal wildlife values should be considered first.

The State Director responded to the NWF comments by letter dated March 23, 1984. Therein he stated:

> The potential owner of the public lands has stated that he does not intend to convert these lands from grassland to grain production. He has stated that he plans to reseed approximately 220 acres in 3 separate tracts to a mixture of alfalfa and grass not only to increase forage production but to mitigate a growing saline seep problem. He has stated that the remaining 1,220 acres will remain undisturbed. All of the lands will be managed for livestock production. I do not consider this a "sodbusting" situation.
>
> These public lands do provide sage grouse and antelope habitat which is not considered crucial since it does not include any breeding grounds and the range of the population is much broader than the public lands in this exchange proposal. Since the potential owner has stated his intent to manage these lands for forage production as indicated above our concern for the future of wildlife populations was lessened.
>
> I share your concern about the "plow out" of lands marginally suited for agriculture and the fact that most marginal lands provide some wildlife habitat compounds my concern. My position

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fn. 1 (continued)
(portion of Tract "B"). Consequently, the November 10, 1983 valuation should be reduced by the 20 acres deleted from Tract "B" as follows:

$183,033.75 less $2,418.80 (20 acres at $120.94) = $180,614.95
Rounded to: $181,000.00

Market conditions have not changed appreciably since the original date of appraisal and no adjustment for time is thought necessary. The current value of the subject selected lands is $181,000.00, with $136,000.00 for the offered property -- a difference of $45,000.00."
This deletion of acreage was apparently occasioned by the fact that as originally proposed the cash differential was greater than 25 percent of the value of the Federal land, and thus, the exchange would have violated 43 U.S.C. § 1716(b) (1982).

> is that BLM in Montana will not contribute to the sodbusting problem on marginally suitable lands.

By letter dated April 3, 1984, the NWF representative again expressed concern with the exchange, both as to wildlife values, specifically sage grouse, and the potential for "plow out." The State Director responded by letter dated April 18, 1984, largely reiterating his earlier statements, and stating that he had been "assured by the potential owner that future management will continue to provide habitat for antelope, sage grouse, fish and wildlife."

A file memorandum dated April 19, 1984, indicates that NWF was advised of its appeal rights concerning the exchange situation and was informed that an appeal would have to be filed within 30 days of having received the State Director's March 23, 1984, response. NWF filed a timely appeal of that determination.

On appeal NWF summarized its arguments as follows:

> [T]he Federation asserts that certain tracts of public lands proposed for exchange contain important habitat to the wildlife of Fergus County while also providing significant recreational opportunities. The public interest is best served either by retaining these lands, or by attaching easements or conditions to the deed to permanently protect these wildlife and recreational values.
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> The Bureau's decision to exchange these lands violates the National Environmental Policy Act [NEPA], 42 U.S.C. § 4321 et seq., in that the wildlife values were not documented nor were other, reasonable alternatives, such as attaching protective easements to the deed considered in the EA accompanying the exchange documents. NEPA is also violated because the 1978 land use plan, upon which the exchange is based, was never subjected to NEPA review.
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> Furthermore, the exchange is not consistent with the BLM's State Director's plan for the area since the MFP [Fergus Management Framework Plan] requires retention of high value wildlife lands.
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> Finally, the exchange violates the Federal Land Policy and Management Act [FLPMA] 43 U.S.C. §§ 1700 et seq. which permits disposal of federal lands only where it will be in the public interest, and only where tracts have been specifically identified for disposal through the land use planning process. In the case of exchange M-58537, no public interest is served by exchanging the lands because of the wildlife and recreational values. At the same time, the MFP governing land management for the area contains no site specific analysis of tracts suitable for disposal and thus it violates FLPMA.

(Statement of Reasons at 2).

In response counsel for BLM did not address any of the contentions raised by NWF; rather he moved to dismiss the appeal citing a lack of explanation by NWF on how it would be adversely affected by the decision to proceed with the exchange. Counsel directs our attention to Oregon Natural Resources Council, 78 IBLA 124 (1984), in support of his motion.

[1] We will first address the issues raised by counsel for BLM, i.e., the standing of NWF to bring this appeal. In Oregon Natural Resources Council, supra, the Board discussed the standing requirements as follows at page 125:

> There are two separate and discrete prerequisites to prosecution of an appeal before this Board: (1) that the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision appealed from. See 43 CFR 4.410. Denial of a protest makes an individual a party to a case. Such a denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally recognizable "interest" has been adversely affected by denial of the protest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982).
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> * * * * * * *
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> Although determinations of judicial standing are not strictly relevant to a discussion of administrative standing under the respective procedural regulations, they may provide a useful guide as to the types of interests which are properly considered in adjudicating administrative appeals. In Re Pacific Coast Molybdenum Co., supra. A keystone in a discussion of standing is Sierra Club v. Morton, 405 U.S. 727 (1972), the Supreme Court's pronouncement on the subject. With respect to its review of the standing issue in that case, the Court declared that "mere 'interest in the problem', no matter how longstanding the interest and no matter how qualified the organization is in evaluating that problem, is not sufficient by itself." Id. at 739. It upheld the dismissal of a suit by a party who had declared itself to represent the public interest and rejected the attempt to substitute concern with the subject for the concrete injury required by the procedural authority conferring the right to seek review. Id. at 739-741. The "injury in fact" test applied requires that the party seeking review be among the injured. Id. at 735.

Although in that case the Council was a "party to the case," the Board concluded that the Council had neither shown nor alleged injury to a cognizable interest, and, thus, lacked standing to appeal. Id. at 126.

In this case NWF is a "party to the case" in that its comments or "protest" to the proposed exchange were rejected by the State Director. Counsel for BLM alleges that NWF has failed to show how it would be adversely affected by the exchange, however.

In its statement of reasons NWF states that it is the country's largest conservation organization; that its members regularly hunt, fish, and camp on

BLM lands in Montana, and that it has participated in the BLM land use planning process throughout Montana. NWF alleges that sec. 35, T. 21 N., R. 19 E., provides year round habitat for some 300 to 500 sage grouse and that sec. 6, T. 20 N., R. 20 E., and part of sec. 31, T. 21 N., R. 20 E., contain a large reservoir which is important to both nesting and migrating waterfowl. NWF claims that both tracts provide good hunting opportunities and are regularly used by the public. 2/

Further, in response to BLM's motion, NWF submitted a statement of standing. Therein, NWF asserts that this case is easily distinguishable from Oregon Natural Resources Council, supra, in that NWF has more than a mere interest in a problem. In that regard NWF claims standing on three separate grounds. First, it asserts that it has members who hunt on the selected lands, and that they will suffer an injury in fact if the proposed land is exchanged. 3/ Second, it contends that its membership in Montana uses the public lands in Montana for recreation; that recreational opportunities on public lands in Fergus County are scarce; and that any diminution of that area will lessen the recreational opportunities for all its members. Therefore, NWF claims that there is an injury in fact to its membership, even though that injury might be characterized as trifling. Third, NWF argues that FLPMA grants it administrative standing to appeal public land decisions in that 43 U.S.C. § 1701(a)(5) (1982) confers administrative standing on third parties to public land decisions.

With regard to NWF's first assertion, it has shown that its members actually use the land in question. Such a showing is itself sufficient to confer judicial standing on NWF. See United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973); Sierra Club v. Morton, supra; National Forest Preservation Group v. Butz, 485 F.2d 408, 410 (9th Cir. 1973). It also clearly satisfies the requirement of 43 CFR 4.410 that an appellant be adversely affected by the decision being appealed. See In Re Pacific Coast Molybdenum Co., supra at 332-34. Thus, we deny the motion by counsel for BLM. 4/

We now turn to the specific contentions raised by NWF. First, NWF claims that the Fergus MFP fails to identify or assess the characteristics of the individual parcels of public land for disposal and, therefore, the proposed exchange violates various land use planning sections of FLPMA, specifically 43 U.S.C. §§ 1701(a)(1) and 1712(c) (1982).

2/ NWF cites as support for its assertions exhibit 3 to its statement of reasons which is a letter dated Mar. 23, 1984, from Dan Vincent, Regional Supervisor, Montana Department of Fish, Wildlife & Parks (MDFWP) to the BLM District Manager, Lewistown, Montana. Vincent was expressing his concerns with the proposed exchange. In a letter to Vincent dated Apr. 5, 1984, the State Director rejected the comments.

3/ In support of this assertion NWF submitted with its statement of standing the affidavits of two of its members, Frank Cook and Kerry Constan. Each of these individuals stated that he had hunted on the selected lands in the past and looked forward to hunting on them in the future.

4/ This determination precludes the necessity to address the other grounds for standing set forth by NWF.

NWF asserts that BLM somehow failed to follow these sections in that they require identification of "areas of critical environmental concern" and that such areas require special management attention to protect and prevent irreparable damage to important fish and wildlife resources. Such an argument overlooks, however, the State Director's position that the lands in question do not embrace areas of critical wildlife habitat. The MFP provides under activity objective L-4 as follows:

> Objective:
>
> Provide an inventory of the small isolated tracts in the unit. Tracts not needed for present and proposed management purposes should be considered for disposal. Disposal action should first consider exchanging these tracts for private lands that have been identified in the management program as being needed.
>
> Rationale:
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> This unit contains many small isolated tracts that do not contain unique scenic values and are not mineral in character. These tracts are difficult and expensive to manage and could often be managed more economically and efficiently as part of adjacent private holdings.
>
> Private lands with high public values can often be acquired through exchange for public lands.

Once the exchange in question was proposed, BLM proceeded to investigate the selected tracts. That NWF disagrees with BLM's assessment does not mean that there has been some violation of the land use planning sections of FLPMA. We reject this argument by NWF.

NWF also asserts that the Fergus MFP does not comply with FLPMA because BLM's failure to identify tracts considered for disposal deprived the public of the opportunity to comment on the MFP's land use plans in a meaningful manner. 5/ Clearly, an ideal situation would be that every isolated tract of public land would be inventoried and identified as to its relative merits for exchange purposes prior to receipt of any exchange proposal. The fact that this was not done did not deprive NWF from meaningful participation in this

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5/ We note that this argument by NWF is in direct conflict with the statement made by its Regional Executive in a letter to the Montana State Director, dated Apr. 3, 1984. Therein, it is stated:

"The Federation would like to express its sincere appreciation for the cooperation we have received from yourself as well as many members of your district and area office staffs in alerting us to the issuance of documents on land disposal at a very early stage in the process. This allows us adequate time to review the tracts proposed, their individual values, and to prepare comments within your deadlines. This also allows us to discuss on an individual basis the proposals with your staff people; these informal meetings have answered many of our questions and certainly have saved both your time and ours."

particular exchange. NWF was allowed the opportunity to submit comments concerning this exchange. Likewise, NWF's argument that the public participation requirement of FLPMA was not met because the public was not given the opportunity to comment on a site specific EA at the MFP stage or in the early stages of this exchange proposal must fail for the reasons stated above.

Next NWF argues that the proposed exchange violates the State Director's guidelines concerning retention of lands with high wildlife values. The guidelines referred to are incorporated in a document entitled "State Director Guidance for Resource Management Planning in Montana and the Dakotas," dated April 18, 1983. That document provides criteria for categorizing public lands for retention, disposal, or further study (Part III, B-3). Under criteria for retention is listed "wildlife priority areas as identified in Appendix I." Id. Appendix I provides the following relevant information:

> WILDLIFE HABITAT MANAGEMENT
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> We will retain and acquire land with significant wildlife values. Significant wildlife values are defined as (a) any area with characteristics in column 1 below, (b) any area with 2 or more characteristics in column 2.

Species	Column 1	Column 2
* * * * * * *		
UPLAND GAME BIRDS		
Sage Grouse	Breeding (dancing ground), nesting of 40 acres or more. Other sage grouse range 80 acres or more.	Breeding, nesting, and brooding areas	and brooding areas 20 acres or more.
* * * * * * *		
WATERFOWL	High production habitat or excellent hunting area 40 acres or more.	habi- habitat or water-fowl hunting	Good reproduction

Appellant argues that the SW 1/4 sec. 35, T. 21 N., R. 19 E., qualifies as significant sage grouse habitat because breeding pairs have been observed there. It is further asserted by appellant that sec. 6, T. 20 N., R. 20 E., and part of sec. 31, T. 21 N., R. 20 E., contain a large reservoir, 50 acres of which is on public land, and that this area meets the waterfowl habitat requirement.

Contrary to appellant's assertion concerning sec. 35, the State Director described those lands as not being crucial, as they did not include any breeding grounds and the population utilized an area greater than the public lands

in question. 6/ Furthermore, even assuming that appellant's assertions concerning the nature of the habitat of the specific lands identified are correct, we note that the guidelines under retention lands provide that "[a]lthough the underlying philosophy is long term public ownership, minor adjustments involving sales and exchanges of land may occur when the public interest is better served" (Part III, B-3). Thus, the guidelines cited by appellant are flexible enough to allow for minor adjustments. The State Director stated in his March 23 response to NWF that "based on the analysis performed, the wildlife, recreation, cultural, historical and range values on the private lands far outweigh the total values on the public lands."

We find no failure to adhere to the guidelines as alleged by NWF.

NWF further claims that no environmental impact statement (EIS) was prepared in connection with the Fergus MFP and that, therefore, land disposal decisions made under the plan do not comply with NEPA. Appellant argues that current BLM regulations (43 CFR 1601.0-6) state that approval of a resource management plan (RMP) is a major Federal action significantly affecting the quality of the human environment and, thus, require that an EIS accompany an

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6/ This information was set forth by the State Director in his Apr. 5, 1984, response to comments on the proposed exchange submitted by Dan Vincent, of MDFWP. Therein he stated:

"Comment No. 1

"The wildlife values are considerable on the following two tracts: Section 35, T. 21 N., R. 19 E. provides year around sage grouse habitat for some 300-500 birds and is an important part of their ever shrinking winter range. Antelope also use this tract during spring-fall period. This tract has provided excellent hunting.

"Response

"These public lands do provide sage grouse and antelope habitat which is not considered crucial since it does not include any breeding grounds and the range of population is much broader than the public lands in this exchange proposal. As you stated, this tract has provided excellent hunting. However, there is no legal access to this tract as well as the others. It is because of the willingness of the potential landowner of the public land that any hunting is allowed at all, on both the public and surrounding private lands. More specifically, the public lands in the exchange are totally surrounded by private lands owned by the potential landowner of the public lands.

"Comment No. 2

"Section 6, T. 20 N., R. 20 E., and part of Section 31, T. 21 N., R. 20 E., contain a large reservoir. This reservoir provides waterfowl nesting and brood rearing . . . This reservoir also supports a grebe colony and a trout fishery. Antelope use this tract from time to time.

"Response

"The reservoir covers approximately 80 surface acres, of which approximately 50 surface acres back up onto public land. The actual dam is located on private land and is owned by the potential landowner of the public lands. He has stocked the reservoir with trout on his own initiative. Antelope do use this tract from time to time, as they do the surrounding private land. I have been assured by the potential owner that future management will continue to provide habitat for antelope, sage grouse, fish and waterfowl."

RMP. Although the regulation does, in fact, require an EIS for an RMP, the document involved in this case is an MFP which is governed by other regulations. The regulation 43 CFR 1610.8 provides in pertinent part:

> (a) Until superseded by resource management plans, management framework plans may be the basis for considering proposed actions as follows:
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> * * * * * * *
>
> (3) * * *
>
> (i) If the proposed action is in conformance [with the MFP], it may be further considered for decision under procedures applicable to that type of action, including requirements of regulations for implementing the procedural provisions of the National Environmental Policy Act in 40 CFR Parts 1500-1508.

The regulations in 40 CFR do not mandate preparation of an EIS; however, they do outline the bases for determining whether an EIS is necessary. 40 CFR 1501.4. It appears from a review of those regulations that preparation of an EA meets the NEPA requirements, and in this case an EA was prepared.

This finding leads to appellant's next contention which is that the EA is inadequate and in error. As an example of the inadequacy of the EA, NWF cites the claims by it and the Montana Department of Fish, Wildlife & Parks (MDFWP) of significant sage grouse habitat in sec. 35, and high waterfowl values in sec. 6, and part of sec. 31. NWF states that the EA only mentions that sage grouse exist on one tract and does not even discuss any waterfowl values. NWF claims that the existence of the disagreement between the State Director and MDFWP as to the sage grouse habitat indicates that the EA must provide better information relating to the environmental tradeoffs which would result from exchanging the land in sec. 35.

NWF also argues that the EA is totally inaccurate concerning recreational use. The land report accompanying the EA states that since the public land is landlocked, it receives "very little or no recreational use from the general public" (Land Report at 2). This is the only statement concerning recreation in BLM's analysis, yet NWF points out that in the State Director's April 5, 1984, response to MDFWP's comments, he confirmed that sec. 35 provided excellent hunting and did not dispute MDFWP's statements concerning waterfowl hunting in sec. 6. The failure to include this information in the analysis, appellant argues, shows a lack of good faith objectivity.

[2] This Board has upheld the BLM denial of a protest to a BLM management decision where the decision is based on an environmental assessment which reflects an evaluation of the environmental impacts sufficient to support an informed judgment. Defenders of Wildlife, 79 IBLA 62 (1984). Herein, appellant has raised serious questions whether the EA is adequate with respect to its assessment of recreational and wildlife values. The EA was approved by the Area Manager and the Lewistown, Montana, District Manager, and the Notice of Realty Action was issued by the Lewistown District Manager. Evaluation of comments, however, was to be done by the State Director. Review of the State Director's responses to the comments of NWF and MDFWP reveals that he

considered the comments and even acknowledged the correctness of some of the allegations, yet he determined to go forward with the exchange. His responses are based, at least in part, however, on assurances from the "potential owner" of the public land that future management of those lands would ensure wildlife habitat. This factor leads us to consideration of appellant's argument that BLM failed to consider reasonable alternatives to the proposed exchange.

Appellant points to 40 CFR 1508.9(b) as requiring that an EA, like an EIS, must discuss alternatives to the proposed action. Appellant argues that the EA fails to discuss feasible alternatives. The EA actually discusses only the proposed action and the no action alternative. The rationale given for not considering other alternatives is that both exchange parties had agreed on the land to be exchanged (Land Report at 1).

Appellant suggests that two other possibilities exist which would achieve BLM's objectives and serve the public interest. These are explained by NWF as follows:

> [T]he BLM failed to consider involving other landowners who would be willing to accept other tracts of public land. To limit the exchange to but two landowners unnecessarily limits the options open to the BLM, and in this exchange, threatens other public values. An alternative should have been developed which expanded the possible pool of landowners.
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> The second option which was ignored by the BLM was the attachment of covenants or easements to the public land tracts to protect public values. * * *
>
> Both NWF and the Montana Department of Fish, Wildlife and Parks expressed two fundamental concerns with the proposed exchange. The first was the taking of important wildlife habitat out of public ownership, and the second was the potential for converting rangeland into farmland (sodbusting or plowout).
>
> A conservation easement granted to a fish and wildlife agency, or a covenant running with the land would have offered a positive solution to both concerns.

(Statement of Reasons at 15-16).

We find no merit to the first alternative suggested by appellant. Appellant claims that BLM should have investigated the possibility of expanding the exchange to draw in other landowners. In this case a landowner proposed the exchange identifying the specific lands. Other landowners had the opportunity to respond to the Notice of Realty Action. In addition, such landowners could also propose lands for exchange. NWF has presented no evidence that other landowners want to be involved in this exchange. In the absence of any such evidence we find that this alternative is not a reasonable one in this particular situation and that expansion of the exchange would needlessly complicate an already cumbersome and time-consuming process.

The second alternative, however, should have been considered. The reasons for this are numerous. First, the regulations at 43 CFR 2200.1(c)(4)

contemplate that the exchange might involve the use of "reservations, terms, covenants and conditions necessary to insure proper land use and protection of the public interest." Both NWF and MDFWP expressed concern that the exchange would result in the loss of important wildlife habitat. 7/ As pointed out above, part of the State Director's rationale for rejecting the comments concerning wildlife values was the State Director's assurance "by the potential owner that future management will continue to provide habitat for antelope, sage grouse, fish and waterfowl" (State Director's April 5, 1984, letter to Dan Vincent).

The BLM record in this case shows that Tom DeMars and his wife will receive title to the selected land from the United States. Robert Bold is noted as the present grazing lessee of the public lands. He signed a document waiving any objection to the exchange. NWF continually refers to Bold as the potential owner of the land, as does MDFWP in its comments. The State Director's reference to "potential owner" is confusing because, based on BLM's records, that person would appear to be DeMars. 8/ NWF appears to assume the reference is to Bold. BLM, however, has not come forward on appeal to clarify the meaning of "prospective owner." NWF alleges that Bold has been actively involved in various sodbusting situations (Exh. 7, Affidavit of Dan Vincent at 1-2). NWF then states that some of the public lands proposed for exchange contain extremely poor soils and that the State Director has specifically stated that BLM in Montana will not contribute to the sodbusting problems on marginally suitable land. In addition, appellant correctly points out that assurances from the "prospective owner," relied on by the State Director, are not binding and do not guarantee protection of the wildlife habitat or soil stability.

Appellant complains that the failure of the EA to discuss the sodbusting situation and to evaluate the alternative of developing protective

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7/ The file also contains a letter dated Apr. 18, 1984, from the Governor, State of Montana, to the Montana, BLM, State Director. Therein, the Governor stated that the public lands in M-58537 contain significant wildlife values. He further commented:

"Your agency's environmental analysis of the exchange concludes that, 'If the public land becomes private and a portion is eventually farmed . . . the identified antelope and sage grouse habitats will be destroyed.' These public lands are some of the last remnants of sagebrush-grassland in an area that has been actively plowed in recent years. Although the Bureau of Land Management and the general public would benefit by acquiring lands within the wild and scenic corridor of the Missouri River, we recommend that the Bureau of Land Management provide some form of protection or mitigation from the anticipated loss of wildlife habitat on these public lands to be traded."

We note that the Governor had been furnished notice of the exchange pursuant to the provisions 43 CFR 2201.1(e), which was promulgated in keeping with section 210 of FLPMA, 43 U.S.C. § 1720 (1982). Neither the statute nor the regulation, however, contains any mandate that BLM conform its proposal to the preference of the State government.

8/ We note that the official BLM case record does not mention Bold, except to the extent that it contains two undated sheets of pencil computations each entitled "Bold/DeMars PX."

restrictions renders the EA inadequate in terms of NEPA compliance. Clearly, the failure to discuss the possibility of sodbusting and the lack of consideration of protective covenants are serious deficiencies in the evaluation of this proposed land exchange. The State Director's response to NWF's sodbusting comments does not address NWF's concern. The State Director stated in his response that he did not consider the exchange to be a sodbusting situation because of the expressed intentions of the potential owner.

The intentions of the potential owner, whoever that might be, do not ensure proper land use and protection of the public interest, however. What is the remedy for the public if the land is conveyed and the owner or his grantee sodbusts the entire acreage? Clearly, without some reservation in the deed there is none. Assurances of the potential owner do not ensure proper land use and protection of the public interest. The State Director should have studied the possibility of proposing conditions or covenants to guarantee protection of wildlife and recreational values in the land.

[3] Appellant further argues that the EA is inadequate because it fails to include a "worst case analysis," citing 40 CFR 1502.22. In Applegate Citizens Opposed to Toxic Sprays (ACOTS), 81 IBLA 398 (1984), the Board discussed the "worst case analysis" requirements mandated by the Ninth Circuit Court of Appeals in certain herbicide spraying cases. Appellant contends that such an analysis is required in this case because of the possibility of sodbusting or plow out of the lands.

Review of the regulation reveals, however, that it is not relevant to the present case. The regulation requires an agency to make known when it is confronted with gaps in relevant information or scientific uncertainty. 40 CFR 1502.22. An agency must then determine if the missing information is essential to a reasoned choice among alternatives. If the missing information is material to the decision, an agency ordinarily must obtain the information and include it in an EIS. 40 CFR 1502.22(a). 9/ If the missing information is material but the costs of obtaining it are exorbitant or, alternatively, if the means for obtaining the information are beyond the state of the art, the agency must "weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty." 40 CFR 1502.22(b). If the agency decides to proceed in the face of uncertainty, it must prepare a worst case analysis including an indication of the "probability or unprobability" of its occurrence. Id. 10/

In this case appellant in essence has alleged that there is information missing from the EA. We have stated that the missing information is material to the decision. However, the regulation requires a worst case analysis only where the cost of obtaining such missing information is exorbitant or the means of obtaining the information are beyond the state of the art, and the agency determines to proceed in the face of uncertainty. There is no evidence that this is the situation in this case. No worst case analysis is required.

9/ The Worst case analysis regulation also applies to EA's. Southern Oregon Citizens Against Toxic Sprays (SOCATS) v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1984).

10/ See comment, Update: The NEPA Worst Case Analysis Regulation, 14 ELR 10267 (1984).

Appellant next declares that BLM's finding of no significant impact is unreasonable in light of the deficiencies which it has highlighted. We do not necessarily agree that BLM's finding was unwarranted. The real question raised by appellant is whether BLM gave adequate consideration to the exchange proposal. The answer to that question must be no. When deficiencies in BLM's analysis of the ramifications of the exchange were exposed by the comments submitted in response to the notice, it was incumbent on the State Director to clarify the record and to address adequately the concerns raised. This he failed to do.

The final argument raised by appellant is that BLM violated its own regulations in the preparation of its Notice of Realty Action. Appellant alleges that the notice fails to identify parties with whom the exchange will occur and the terms and conditions of the exchange as required by 43 CFR 2200.1(c). The land report which was cited in the notice identifies Tom DeMars as the person involved in the exchange. Appellant charges that Robert Bold will actually be acquiring the land and that this fact should have been included. As we have previously stated, the official BLM record does not specifically disclose that Bold is a party to the exchange, except to the extent he is the grazing lessee of the public lands in question. If Bold is an actual participant in the exchange itself, then his role should be disclosed.

Neither the land report, EA, nor the notice states that a cash payment to equalize value is involved in this exchange, although that fact is disclosed by the record in the case. The regulations require that the notice contain the terms and conditions of the exchange. The notice did not comply with that requirement.

For the reasons stated above, we must vacate the State Director's decision appealed from and remand the case for further consideration in light of this decision. On remand BLM should adequately address the concerns raised by NWF. This should be done in the context of an expanded EA and land report. If BLM determines to proceed with the exchange, it should provide proper notice in accordance with the procedures in 43 CFR Part 2200.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge